TSEN KYUN TSHIN

v.

LEE TSE KHIONG

HIGH COURT SABAH & SARAWAK, KUCHING
MUHAMMAD KAMIL AWANG J
[ORIGINATING SUMMONS NO: 24-126-97-III/II]
5 MAY 1998

CIVIL PROCEDURE: *Execution - Stay - Application for - Whether special circumstances shown - Whether appeal would be rendered nugatory - Merits of appeal - Consideration of*

This was an application by the defendant for a stay of execution pending his appeal to the Court of Appeal against the court's order for the removal of a caveat. The only ground in support of the application was that if a stay was not granted, the appeal if successful, would be rendered nugatory, and this would cause irreparable damage to the defendant. Counsel for the plaintiff submitted that there were no special circumstances shown in the affidavit in support of the application and that the appeal had no merit at all.

Held:

[1] It is trite law that an appeal does not operate as a stay of execution and that the court has an absolute and unfettered discretion to grant or refuse an application for a stay. As a rule, the court will only grant such an application if there are special circumstances. In the instant case the defendants had failed to show in the affidavit in support of the application that there were special circumstances to warrant a stay. On this ground alone, the application could not stand.

[2] On the question of whether an appeal would be rendered nugatory, the court is entitled to take into account the merits of the appeal. In the instant case, the appeal was obviously unarguable as the court found the defendant guilty of laches in that the defendant having entered a caveat to protect the interest in the land had not with reasonable diligence gone on to assert his right. The delay of seven years after lodging the caveat was an inordinate and inexcusable delay. There was no explanation given by the defendant which the court could consider. Therefore, based on the evidence, the appeal was doomed to fail.

[Application dismissed with costs.]

Cases referred to:
Atkins v. Great Western Railway [1886] 2 TLR 400 ***(cit)***
Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd [1989] 2 CLJ 584 ***(foll)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 ***(foll)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 ***(cit)***
Leong Poh Shee v. Ng Kat Cheong [1966] 1 MLJ 86 ***(foll)***
Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan [1996] 4 CLJ 256 ***(cit)***
Monk v. Bartram [1891] 1 QB 346 ***(cit)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 ***(refd)***
Serangoon Garden Estate v. Ang Keng [1953] 19 MLJ 116 ***(foll)***
Sykt Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(foll)***
Tan Soo Bing & Ors v. Tan Kooi Fook [1996] 3 MLJ 547 ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Rules of the Court of Appeal 1994, r. 13
Rules of Supreme Court [UK], O. 59 r. 13(1)

Other source referred to:
Halsbury's Laws of England, 3rd edn, vol 16, p 35

For the plaintiff - Fabian Lim; M/s Lim & Lim Advocates
For the defendant - Jimmy Simon Maja; M/s Maja, Ngui & Co

*[**Editor's note:** for a recent decision on the approach to be taken in considering whether or not to grant a stay, please see also the case of Perwira Affin Bank Bhd v. Hj Zakaria HJ Ismail & Ors [1998] 2 CLJ 770.]*

Reported by Cindy Chan

JUDGMENT

Muhammad Kamil Awang J:

This is an application (encl. 3) for stay of the execution pending appeal to the Court of Appeal, against the court's order for the removal of caveat.

Learned counsel for the defendant, Mr Jimmy Simon Maja's only ground in this application is that if a stay is not granted, it would render the appeal nugatory if successful, and would cause an irreparable damage to the defendant. He cited two cases in support:

> *Tan Soo Bing & Ors v. Tan Kooi Fook* [1996] 3 MLJ 547; and *Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd* [1989] 3 MLJ 40.

Mr Fabian Lim, learned counsel for the plaintiff, submitted that there were no special circumstances shown in the affidavit in support of the application and that the appeal had no merit at all. The authorities cited are:

> *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 MLJ 105; *Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan* [1996] 4 CLJ 256; *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598.

It is trite law that an appeal does not operate as a stay of execution (see s. 73 of the Courts of Judicature Act 1964) (Revised 1972); r. 13 of the Rules of the Court of Appeal 1994 and the English Rules of Supreme Court O. 59 r. 13(1)). The court has an absolute and unfettered discretion to grant or refuse an application for stay. *Halsbury's Laws of England,* 3rd Edn, Vol 16 at p. 35 states:

> The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule only grant it if there are special circumstances, which must be deposed to on an affidavit unless the application is made at the hearing.

Brown J, in *Serangoon Garden Estate v. Ang Keng* [1953] 19 MLJ 116 said:

> There is no rule on practice limiting the exercise of his discretion. But it is a clear principle that the court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can shew special circumstances to justify it.

This is summed up clearly by Hashim Yeop Sani J (as he then was) in *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406, at p. 407:

> The law on the granting of an order for stay of execution has been examined a number of times in the courts of this country. It is trite law that the court has an absolute and unfettered discretion to grant or refuse an application for stay. As a rule the court will however only grant stay if there are special circumstances and which circumstances must be deposed in the affidavit supporting the application.

"Special circumstances, as the phrase implies, must be special under the circumstances as distinguished from the ordinary circumstances. It must be something exceptional in character, something that exceeds or excels in some way that which is usual or common." per Raja Azlan Shah J (as His Majesty then was) in *Leong Poh Shee v. Ng Kat Cheong* [1966] 1 MLJ 86.

It is plain that the validity or correctness of the decision appealed from are not special circumstances. See *Monk v. Bartram* [1891] 1 QB 346 (CA). Merits or strong grounds for an appeal are also not special circumstances. See *Atkins v. Great Western Railway* [1886] 2 TLR 400.

In *Che Wan Development Sdn Bhd v. Co-Operative Central Bank Bhd* [1989] 3 MLJ 40, NH Chan J (as he then was) said at p. 43:

> ... in my judgment, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the defendant to a stay of execution.

In *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 2 MLJ 119 the Federal Court held that "in the exercise of the inherent jurisdiction of the High Court, the judge had the power to grant a stay of execution until the determination of the taxpayer's appeal to the Special Commissioners. ... Although the onus was upon the taxpayer to demonstrate special circumstances justifying a stay, there was no material upon which the judge could have granted the order for a stay."

In the instant case the defendant had failed to show in the affidavit in support of the application that there are special circumstances to warrant a stay. On that ground alone the application cannot stand.

As to the proposition that it would render the appeal, if successful, nugatory, as the principle to be adopted in the case, Gopal Sri Ram JCA in *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors (supra)* said at p. 611:

> But cases may arise where, in determining the critical question whether an appeal would be rendered nugatory, this court comes to the conclusion that the point concerned in the pending appeal is obviously unarguable. In such cases it would not, as I perceive the law, be a proper exercise of discretion for this court to shut its eyes to the practical realities of the situation, and to nevertheless proceed to grant a stay.
>
> Take this very case. It is clear from the authorities that the substantive appeal, based upon a single point of interpretation, lacks all merit and is doomed to failure. In this state of affairs, would it be a proper exercise of discretion to permit a stay and cause a delay in the prosecution of the petition? I think not. Apart from the absence of merits, there are other reasons as well.

It is clear from the decisions in *Kerajaan Malaysia v. Jasanusa Sdn Bhd (supra); See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors (supra);* and *Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan (supra);* and that in determining the critical question whether an appeal should be rendered nugatory, the court is entitled to take into account the merits of the appeal. In the instant case, the appeal is obviously unarguable. In the instant case the court found that the defendant was guilty of laches, and in the court's decision, that "... the defendant, having entered a caveat to protect the interest in the said land, had not, with reasonable diligence, gone on to assert his right. The delay of 7½ years after lodging the caveat is, to my mind, an inordinate and

inexcusable delay." There was no explanation given by the defendant which the court could consider. Based on the evidence, the appeal is doomed to failure.

In the circumstances, I dismiss the application for stay with costs.